No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1967

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
PETITIONER

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, PACIFIC MARITIME ASSOCIATION AND MARINE TERMINALS CORPORATION, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL MARITIME COMMISSION

JAMES L. PIMPER,
General Counsel,

ROBERT N. KATZ,
Solicitor,

JOSEPH F. KELLY, JR.,
Attorney,
Federal Maritime Commission
Washington, D.C. 20573.

INDEX

CITATIONS

Cases: Page

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 69

VOLKSWAGENWERK AKTIENGESSELLSCHAFT,
PETITIONER

v.

FEDERAL MARITIME COMMISSION AND THE
UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL MARITIME COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 779-801) is reported at 371 F.2d 747. The report of the Federal Maritime Commission (R. 666-728) is printed at 9 F.M.C. 77.

JURISDICTION

The judgment of the court of appeals (R. 802) was entered on December 22, 1966. The petition for a

writ of certiorari was filed March 20, 1967, and granted June 12, 1967. (R. 803). The jurisdiction of the Court is invoked under 28 U.S.C. §§ 1254(i) and 2350(a) (Supp. II).

STATUTES INVOLVED

The pertinent provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. § 801 *et seq.*, are set forth in the appendix, *infra*, pp. 34-37.

QUESTIONS PRESENTED

1. Whether all agreements of any nature among persons or parties covered by the Shipping Act, 1916 (46 U.S.C. § 814) must be filed with the Federal Maritime Commission?

2. Was there a rational basis for the Federal Maritime Commission to rule that this agreement was not an agreement of the type required to be filed for approval under section 15 of the Act?

3. In the absence of sufficient substantial evidence to convince the Commission that the method of fund collection constituted unreasonable prejudice in violation of section 16 of the Act and an unreasonable practice in violation of section 17 of the Act, is the Commission's finding of no violation reversible?

STATEMENT

The relevant facts detailed in the decision of the Commission's Hearing Examiner (R. 611-56), the Commission's report (R. 666-728) and the decision of the court of appeals (R. 779-801) are largely uncon-

tested. Rather, petitioner and the United States dispute the conclusions drawn from those facts by the agency and court.

1. The Parties

Volkswagen. Petitioner manufactures Volkswagen automobiles and was shipping about 40,000 Volkswagens a year to United States Pacific Coast ports in 1961 and 1962. Seventy to seventy-five percent were transported on vessels chartered by Volkswagen; the remainder on common carriers. (R. 614).

Pacific Maritime Association. Pacific Martime Association (PMA) is an incorporated non-profit organization of about 120 employers engaged in operating steamships, operating as stevedores in the various ports on the Pacific Coast, and operating ocean terminals. (R. 179, 616). The function of PMA is to bargain collectively in behalf of its members with Pacific Coast maritime unions, and administer and implement the labor contracts. (R. 179, 616, 667). Collective bargaining between PMA and the labor unions is subject to the National Labor Relations Act and to the jurisdiction of the National Labor Relations Board, pursuant to 29 U.S.C. § 141 *et seq.* Contracts negotiated by PMA are binding on all members unless they withdraw from the organizations within seven days. (R. 397).

Corporate power is vested in a twenty-one man Board of Directors selected from member representatives of eight geographical or functional groups defined in the By-Laws. (R. 381, 383-86). To finance PMA's operations and obligations under the labor

contract the Board is empowered to fix and levy cargo, shipping and payroll dues and assessments upon members. (R. 404).

Marine Terminals Corporation. Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) (MTC) are two PMA members. MTC furnishes ocean terminal and stevedoring services at San Francisco and Long Beach piers for both common and contract carriers. Generally, terminal services include certain clerical functions and the sorting, checking and the storage of cargo on the piers; stevedoring basically consists of the actual cargo loading and unloading by longshoremen. (R. 615). Volkswagens are among the cargo handled by MTC.

2. The Mechanization fund

PMA began negotiations in 1957 with the International Longshoremen's and Warehousemen's" Union (ILWU) regarding mechanization and utilization of labor saving devices on the piers. (R. 618, 244). A "Memorandum of Understanding" (Ex. 1-A; R. 243) was signed on August 10, 1959, reflecting modifications of the PMA-ILWU 1958 collective bargaining agreement as to wages, length of the work day, new equipment, vacations and other traditional labor-management issues. The Memorandum also reflected an agreement to study further the mechanization issue with the aim of achieving the specified goals of the bargaining parties. PMA sought to introduce labor-saving devices to increase waterfront productivity; ILWU demanded that its members share in the resultant savings, that there be no acceleration of pro-

ductivity demanded of individual workers and that there be no unsafe conditions created as a result of the labor-saving devices.

PMA demonstrated its earnestness by depositing $1.5 million into a fund for the benefit of the work force. The memorandum did not specify how PMA was to raise the money. (R. 618, 668, 244-47).

On October 18, 1960, the parties signed a "Memorandum of Agreement on Mechanization and Modernization." (Ex. 1-B; R. 262). This second memorandum established a "mechanization and modernization fund" to which PMA would contribute $29 million over a period of time ending July 1, 1966. The parties further agreed to extend the entire labor agreement until that date. By the terms of the memorandum, the $29 million was to be funded at the rate of $5 million each year with credit given for the $1.5 million already collected by PMA pursuant to the August 1959 agreement. The method of accumulating the fund was discussed with the union (R. 206-10), but since the mechanization fund plan contemplated that the members of PMA commit themselves individually and severally to payment of the fund, ILWU agreed that PMA could determine the method of collection from the members. (R. 619, 668, 207).

The President of PMA appointed a six-man Committee on Work Improvement Fund in November 1960 to recommend a method for dividing the costs of the fund. The Committee's majority report (Ex. 5-A, R. 466) was adopted by the Board of Directors and the PMA membership on January 10, 1961. (Ex.

2-O; R. 372). Payments to the fund began immediately although the final form of the agreement was not settled until November 1961 when PMA and ILWU executed a Supplement Agreement effective January 1, 1961. (Ex. 1-C; R. 279).

The method of assessment recommended by the majority of the Work Improvement Fund Committee was based on a cargo tonnage basis.[1] The tonnage formula was chosen over alternatives discussed in the Committee report. (Ex. 5-A; R. 466). One alternative would have made man-hours expended the basis for assessment rather than cargo tonnage handled. The majority rejected the man-hour approach reasoning that since the overall intent of the agreement was to reduce the number of man-hours, it would be inequitable to adopt a contribution formula by which the operators who received the greatest benefits would pay a decreasing percentage of the total contributions to the fund. (R. 468, 474).

Tonnage determinations were to be made according to a traditional "formula used for the computation of a portion of PMA dues." (R. 470, 623, 668, 110). Members agreed that tonnage declarations were to be made just as in the 1959 dues assessment reports. (Ex. 2-N; R. 371, 624, 625).

The historical method of declaring automobile tonnage for cargo dues assessment was on a measurement basis. (R. 621, 670, 218, 160-61, 110-11). Prior

---

[1] The ton is defined as consisting of 2,000 pounds weight, 40 cubic feet measurement or 1,000 board feet of lumber. (R. 623).

to the establishment of the mechanization fund, neither Volkswagen nor any other person protested the measurement used to report tonnage dues on automobiles. (R. 622).

"In fixing and levying that portion of the cargo dues assessed according to tonnage handled, the Board of Directors may establish different rates per ton, or other measurement unit for different classes of cargo." (R. 406). As finally implemented the formula simply called for the payment of 27½¢ per ton on general cargo handled and 5½¢ per ton of bulk cargo. Members were to pay PMA who was to act as collecting agent of the fund. Non-member employers whose employees belonged to the ILWU also contributed to the fund at rates comparable to those assessed against members. (R. 631-32).

A Volkswagen averages 8.7 measurement tons but only 0.9 weight tons. At 27½¢ per ton, the fund assessment on a measurement basis is $2.35 per vehicle and on a weight basis equals 25¢. (R. 626). Nevertheless, the rate charged by MTC to discharge a VW decreased after implementation of the mechanization plan (R. 627, 155, 162) because of increased productivity. (R. 633, 143-144).

3. The Refusal To Pay The Assessment

Shortly after the members agreed on the method of measuring cargo PMA sent a letter to the members noting that a number of steamship companies were persisting in reporting automobiles on a weight rather than measurement basis. The letter reminded the members that the measurement basis for automobiles

had been established by a letter in January 1958 and the method was still effective. (See R. 161). Members who had been improperly reporting automobiles on a weight basis were required to revise their past tonnage declarations and pay an assessment on the difference. (Ex. 36, R. 524).

By a January 17, 1961 letter from its agents, Volkswagen protested the measurement basis of assessing PMA members for automobiles handled. (Ex. 7, R. 481). PMA reconvened its committee on the fund which in February 1961 considered protests by Volkswagen and others as to PMA's method of assessing members. Some changes were approved by the Board of Directors, but the Committee recommended continuance of the measurement ton basis for automobiles regardless of how they were manifested. (Ex. 2-L; R. 366, 628-29, 670). On March 1, 1961, MTC informed PMA that Volkswagen was refusing to pay to MTC a sum equal to an assessment based on measurement tons. (Ex. 9, R. 486). MTC in turn refused to pay its assessment to PMA. (Exs. 13, 14; R. 695-97). No other shipper of automobiles protested the method of assessment (R. 633) although one common carrier of VW's, Wallenius Lines, refused to pay its assessments upon learning in 1963 of Volkswagen's action. (R. 632, fn. 20).

In December 1961 the fund committee considered and rejected (Ex. 2-H; R. 356) Volkswagen's proposal for an assessment on a unit basis. (Ex. 26; R. 511). Unit assessment, it was felt, would have an undesirable effect on the overall program since unit

assessment would also have to be set up for other commodities. (R. 630).

The Coast Steering Committee of PMA directed on March 27, 1967 that a letter be sent to MTC (or Volkswagen) advising them that the fund committee had again considered the assessment on automobiles and did not recommend a change. (Ex. 31, R. 517). The Coast Steering Committee also advised the Board that PMA should stay out of any litigation between MTC and Volkswagen unless the mechanization fund was in jeopardy or other industry interests were threatened. Moreover, PMA reserved the right to institute an action against MTC if the latter remained in default of its fund obligations.

4. Proceedings Below

PMA instituted suit against MTC in the United States District Court for the Northern District of California on August 14, 1962. MTC impleaded Volkswagen on September 13, 1962 and the District Court stayed the proceedings on November 29, 1962 in order to permit Volkswagen to commence a proceeding in the Commission. The following issues were to be submitted to the Commission for its determination:

> 1. Whether the assessments claimed from [Volkswagen] are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. § 814 (1961), before it is lawful to take any action

thereunder, which agreement had not been so filed and approved.[2]

2. Whether the assessments claimed from [Volkswagen] result in subjecting the automobile cargoes of [Volkswagen] to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U.S.C. § 815 (1961).

3. Whether the assessments claimed from [Volkswagen] constitute an unjust and unreasonable practice in violation of Section 17 of the Shipping Act, 1916, as amended, 46 U.S.C. § 815 (1961).

On January 29, 1963, petitioner filed its complaint with the Commission. Hearings were held before Hearing Examiner Benjamin A. Theeman, and on June 5, 1964, Examiner Theeman issued his Initial Decision. The Examiner found, *inter alia*, that MTC were persons subject to the Shipping Act, and that

---

[2] Section 15 states in pertinent part: "That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume of character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement."

the agreement entered into between MTC and other PMA members on January 10, 1961 was a cooperative working arrangement within the literal meaning of section 15 of the Act, 46 U.S.C. § 814. (R. 644). But that agreement, he stated, consisted of only two items: (1) the report of the Work Improvement Fund Committee dated January 4, 1961, (Ex. 5-A, R. 466), and (2) the resolution of PMA's membership dated January 10, 1961, (Ex. 2-O, R. 372). (R. 636). The Examiner observed that

> "A careful reading of these documents show that they deal solely with 'the appropriate method of dividing the costs' of the Mech Fund among the PMA members. Nothing contained in the Committee report or the minutes of the January 10, 1961 meeting indicates that the Committee or the PMA membership in ratifying the majority report had gone or had intended to go beyond that specified area." (R. 637, footnote omitted).

Therefore, the Examiner concluded, the mechanization fund agreement was not the sort of cooperative working arrangement required to be filed under section 15. (R. 644).

The Examiner further found that the cooperative working arrangement between MTC and other PMA members was not one which fixed or regulated transportation rates or fares; gave or received special rates, accommodations, or other special privileges or advantages; controlled, regulated, prevented, or destroyed competition; pooled or apportioned earnings, losses, or traffic; allotted ports or restricted or otherwise regulated the number and character of sailings

between ports; or limited or regulated in any way the volume or character of freight or passenger traffic to be carried. (R. 655-56). Accordingly, the mechanization fund agreement was found to be without the filing requirements of section 15.

Additionally, the Examiner found it unnecessary to determine whether the cooperative working arrangement was part of a collective bargaining agreement or whether the arrangement violated the antitrust laws. (R. 649-51). He also found no violations of sections 16 and 17 of the Shipping Act. (R. 651-55).

After exceptions and oral argument, the Commission issued a report on October 13, 1965. (R. 666-728). The majority of the Commission affirmed the Examiner's finding that the arrangement between MTC and other members of PMA was not subject to the Shipping Act even assuming "all of the members of PMA are 'other persons' within the meaning of the Shipping Act, 1916, . . ." (R. 673). The Commission found that the agreement among the membership of PMA establishing the method of assessing for the collection of the fund "does not fall within the confines of section 15 as, standing by itself, it has no legal impact upon outsiders." (R. 675). The Commission further found that an additional agreement among the membership of PMA to pass on all or part of the assessments for the fund to carriers or shippers had not been established. (R. 675).

In finding no additional agreement, the Commission stated:

> "The record is devoid of evidence showing the existence of such an additional agreement. The

record at most shows that some stevedores expressed the opinion that it might be necessary to pass on the assessment in the stevedoring rate to their customers. That these opinions were the basis for an agreement as to the manner of assessing their customers is denied by statements of witnesses for both PMA and respondents. Such conclusion is further vitiated by the actions of respondent and perhaps other terminal operators, who were willing to absorb a part of the assessment." (R. 675-76).

The majority of the Commission also found itself in agreement with the Examiner that there were no violations of sections 16 and 17 of the Shipping Act. (R. 676-78). Commissioner Patterson dissented from the majority report in all respects (R. 678 *et seq.*); Commissioner Hearn agreed with the majority that there were no violations of sections 16 and 17 of the Shipping Act, but he disagreed with the majority on the issue of whether there was an agreement subject to section 15. He would have required PMA to file its cooperative working arrangement with the Commission and seek approval. (R. 723 *et seq.*).

The United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's order on December 22, 1966. The court found all of the Commission's conclusions supported by substantial evidence.

SUMMARY OF ARGUMENT

1. Not every agreement among persons subject to the Shipping Act, 1916 need be filed with the Federal Maritime Commission.

The legislative history supports the conclusion that the framers of this Act did not intend that all agreements entered into by or between persons covered by the Act be filed for approval. Sound reasoning and logic compel a delineation of the area within which agreements must be filed.

2. There was a rational basis for the Commission to conclude that the agreement herein involved was not that type of agreement which falls within section 15 of the Act. There was no showing of a direct competitive impact upon shippers. To extend antitrust immunity to combinations *or* agreements not directly affecting ocean transportation would derogate antitrust laws.

3. After adequate and careful consideration of the evidence before it the Commission concluded that there was no adequate showing of unreasonable prejudice or an unreasonable practice in violation of sections 16 and 17.

ARGUMENT

I. Legislative History and Antitrust Exemption Policy

The framers of the Shipping Act, 1916, did not intend that every agreement among persons subject to the Act, was to be filed with the Commission under section 15 of the Act.

The petitioner has grossly misconstrued the intent and purpose of the Shipping Act, 1916. The passage of that Act was intended to bring under scrutiny by a regulatory agency the anti-competitive activities of ocean carriers and other parties subject to the Act,

and to grant exemption for certain activities from the antitrust laws when certain standards are fulfilled. Nowhere in the legislative history is there any indication that all agreements entered into by parties subject to the Shipping Act, 1916, must be filed with the Federal Maritime Commission; nor can it be argued that all categories of agreements entered into by and between parties covered by the Act are, or indeed should be, entitled to exemption from antitrust laws. All activity of the maritime industry has not been placed beyond the reach of antitrust laws as a result of enactment of the Shipping Act, 1916. The oft cited *Alexander Report*,[3] which presaged the Act, dealt extensively with rate and cargo pooling arrangements. In its recommendations the Committee stated as follows: "While admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action." H.R. Doc. No. 805, 63d Cong., 2d Sess. p. 417 (1914). These remarks were made in connection with discussion of arbitrariness in settlement of just claims, fighting ships, deferred rebates and threats to refuse shipping accommodations. Accordingly, the Committee was clearly most concerned with the steamship

---

[3] *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H.R. Doc. 805, 63 Cong., 2d Sess., p. 415 (1914).

agreements and conferences. The concern with related and remote activities, and the limited extent of such concern is clearly established by the remarks of Representative Alexander which immediately follow those remarks quoted by petitioner in its brief, citing 53 Congressional Record 8276 (1916). Representative Alexander stated as follows: "And mind you, when you read the provisions of this bill, it only provides that there shall not be unjust discrimination *between shippers.*" (Emphasis supplied.) This was in connection with the discussion of supervision of incidental facilities connected with the main carriers. The Commission, in its administrative discretion, found no showing of unjust discrimination between shippers.

The *Alexander Report* primarily addressed itself to those "written agreements, conference arrangements or gentlemen's understandings, which have for their principal purpose the regulation of competition through either (1) the fixing or regulating of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of non-conference lines." H.R. Doc. No. 805, 63d Cong., 2d Sess., p. 417 (1914). The agreement among the members of PMA allocating assessment for the mechanization fund is not the type of agreement, arrangement or understanding with which the Alexander Committee was concerned and sought to regulate or prohibit.

This court has repeatedly stated that it strongly disfavors repeals of antitrust laws by implication from a regulatory statute and that such have only been found in cases of plain repugnancy between the antitrust and regulatory provisions. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) and *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963).

The United States suggests that every agreement involving any aspect of the maritime industry should be submitted to the Federal Maritime Commission for approval if it involves a Sherman Act issue. (Brief for United States, p. 24). Such an argument poses a new and novel legal concept. To extend this argument to other regulated industries would completely derogate and emasculate the antitrust laws.

Where then is the line to be drawn? The legislative history indicates that a line is to be drawn. Common sense dictates that a line must be drawn. Administrative efficiency and equity require that a line be drawn. This Court desires that a line be drawn.

The agreement to implement the mechanization fund is essentially a cost pooling arrangement. Nowhere in section 15 is a cost pooling agreement expressly required to be filed although agreements to pool earnings, losses and traffic are specifically enumerated. The brief for the United States, at page 24, states that it is plain that an agreement among competitors allocating a shared cost is normally subject to the Sherman Act. If all cost pooling agreements are to be filed with the Federal Maritime Commission as collective actions subject to scrutiny by

the Commission, what chaos could result! The Commission could be flooded with requests for approval of trivial cost sharing agreements. The Commission in its opinion pointed out that secretarial pooling or office space sharing should not be subject to scrutiny by the Commission. (R. 674). Similarly, the Commission has in the past indicated that joint advertising of services would not constitute a cooperative working arrangement. *Maatschappij Zeetransport N.V. (Oranji Line), et al.* v. *Anchor Line Ltd.*, 6 FMB 199 (1961). See also *Los Angeles By-products Co.* v. *Barber Steamship Lines, Inc.*, 2 U.S.M.C. 106, 108 (1939). This is not to say that the Commission has been or would be loathe to find agreements subject to the Act when the facts of a given situation put them squarely within the intent of section 15. The Commission, however, has realized that limitations are inherent in a sensible reading of the statute. On the other hand, if all agreements which provide for the sharing of costs among persons subject to the Act are subject to section 15 approval, some obviously anti-competitive practices might receive antitrust immunity. For example, carriers in a conference might agree to jointly purchase certain goods or services from a manufacturer who is not a shipper (or other person subject to the Act) and is not in a competitive position with shippers. Since there would be no discrimination among shippers and no competitive advantage to the conference when the conference is free from non-conference competition, that joint purchase agreement might possibly be approved by the Commission pursuant to section 15. Yet the carriers and their sole

supplier will have been participating in a grossly competitive action which will have been immunized from antitrust prosecution. It is inconceivable that such should be sanctioned.

II. The Commission Properly Concluded That The Agreement Does Not Fall Within Section 15 And The Commission's Interpretation Of Its Statutes Should Be Upheld

The Hearing Examiner and the Commission, in ascertaining whether an agreement existed which was required to be filed by the Shipping Act, 1916, analyzed the only understanding which can be involved and at issue here, namely, the agreement allocating the mechanization fund assessment among PMA members. From evidence presented the Commission found that the agreement for assessment, standing alone, had no competitive impact upon outsiders. (R. 675). That assessment, standing alone, did not involve shippers and, in fact, involved nothing more than a reasonable basis for the joint sharing of costs arrived at by some reasonable determination. (R. 677). That assessment, standing alone, did not involve any charges by PMA to customers or clients of PMA's membership. (R. 638). One member of PMA in fact who was handling Volkswagens paid the assessment until it learned that MTC was not paying the assessment. (R. 632, footnote). MTC's individual decision to pass the cost on to Volkswagen is the specific act which led to and gave rise to this litigation, not the assessment among PMA's membership. This allocation is very similar to trade association

dues discussed in *Kennedy* v. *Long Island R.R. Co.*, 319 F.2d 366 (2d Cir. 1963), *cert. denied*, 375 U.S. 830 (1963). In fact, for years PMA assessed its dues on the very basis, without any objections, to which petitioner now, some years later, takes exception. (R. 677). The assessment of dues on a measurement ton basis, as well as assessment of the cost of the mech fund on a measurement ton basis, follows the custom of the industry.[4]

The non-applicability of section 15 to the agreement may be established on bases other than that the mech-fund agreement may have been related to labor-management problems. Although the Commission looked to a decision involving labor-management relations, its primary concern was the basic issue of whether there was a competitive relationship *Kennedy* v. *Long Island R.R. Co.*, *supra*, 319 F.2d

---

[4] Cufley, *Ocean Freights and Chartering*, 279 (1962), states as follows:

> "For the purposes of liner working the measurement ton is not reckoned on the stowage factor of the goods, i.e. their real volume per ton weight. It is calculated on the actual space occupied in the holds or other cargo compartments. This serves to compensate the shipping company for BROKEN STOWAGE, which is the space lost between one package and another and not allowed for in stowage factors relating to other than bulk goods. Thus when automobiles are carried, their overall maximum measurements are taken. Height, breadth and length are then 'cubed-up' and freight is payable on the block of space bounding the extremities of the vehicle. In practice the shipowner, exercising his option to charge per ton W/M, will receive freight on from 10 to 20 tons 'measurement', although the motorcars weigh only from 1 to 2 tons each." (emphasis supplied)

366 (2d Cir. 1963). *Kennedy* involved an interpretation of section 5(1) of the Interstate Commerce Act, 49 U.S.C. § 5(1). That section predated section 15 of the Shipping Act and like section 15 authorizes the filing of pooling agreements for agency approval. The Long Island Railroad sought to ameliorate the effect of union whipsawing by subscribing to an insurance program which supplied a limited amount of funds to roads hit by a certain limited class of strikes. Appellant contended that the plan was a pooling agreement which violated section 5(1) of the Interstate Commerce Act because it had not been approved by the Interstate Commerce Commission. The court said:

> "* * * We believe this section to be an expression of transportation policy solely and not of labor policy. Thus, at the time the act was passed, 'pooling' was defined as
>
> > simply an understanding or agreement among the roads that each shall take a certain proportion of the business of the territory they compete for, and in the event of their not being able to divide the business physically, they equalize the disadvantages by dividing profits.
>
> See S.Rep. No. 46, 49th Cong., 1st Sess., Appendix p. 153 (1886). It may be true that the collection of premiums and payment of proceeds to a struck railroad might be viewed literally as 'the division * * * of gross or net earnings,' since contributions to the insurance fund were from the passenger and freight revenues of the participating roads. But so too are their *contri-*

> *butions to the A.A.R., a trade association whose expenses are met by assessments from its members* in proportion to their operating revenues; but we do not understand the appellants to contend that the mere existence of the A.A.R., or of any other trade association in the transportation field, runs afoul of the anti-pooling provision of the Interstate Commerce Act and also, incidentally, of the Sherman Act. Similarly here, the strike insurance plan does not represent an attempt to apportion business among *competing* railroads on a basis other than individual performance. Its validity under the Interstate Commerce Act § 5(1) can thus hardly be doubted." 319 F.2d at 374. (Emphasis supplied, footnotes omitted.)

In the instant case, the Commission found that the mechanization fund agreement did not affect the competitive relationships among the PMA members, as there was no agreement among the members to pass on all or a part of the fund assessments. The decision of whether to absorb or pass on the assessments was left to each individual member, and there was no evidence of any concerted action taken to determine how the members were to meet the assessment. The Commission explicitly found that there was a divergence of action among the members as to whether the assessments would be absorbed or passed on. (R. 676).

Petitioner cannot seek refuge in the cases cited in which the Civil Aeronautics Board has examined agreements affecting labor-management relations. Every agreement "affecting air transportation" must

be filed with the Civil Aeronautics Board, 49 U.S.C. § 1382, and obviously labor management agreements in the aviation industry affect air transportation. On the other hand, neither the Shipping Act nor the Interstate Commerce Act contain such sweeping language, but rather spell out the agreements which must be filed.

The interpretation of these statutes, as determined by the Commission, must be upheld. Upon the evidence presented to it the Commission found no agreement which had a direct competitive effect upon shippers. This finding, approved by the court of appeals, according to statements of this Court, must be upheld. See *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607 (1966). The legislative history is clear that an agreement of the type found to exist here by the Commission is not, as a matter of law, an agreement which must be filed pursuant to section 15 of the Shipping Act, 1916.

In addition to such legal basis for the Commission and court's conclusion, there is further a rational basis for that conclusion. The Commission's interpretation in these circumstances was a reasonable one, and even though it may not have been the only reasonable one that could have been reached, it should be upheld especially where, as here, it is supported by the legislative history and a similar construction of like provisions of the Interstate Commerce Act. As the U. S. Court of Appeals for the District of Columbia Circuit recently said,

> "In approaching the problem of statutory interpretation before us, we show "great deference

> to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'" *Philadelphia Television Broadcasting Co.* v. *Federal Communications Commission*, 359 F.2d 282 (D.C. Cir. 1966) (footnote omitted).

In its decision in the instant case the court of appeals stated appropriately as follows:

> "Deference must also be paid in this case to the Commission's expertise, especially in view of the technical and specialized nature of the subject area over which it has jurisdiction.
>
> Applying these general principals to the specific issues before us in this case, and giving due deference to the expertise of the Commission, we conclude (albeit with some hesitation) that there is substantial evidence in the record considered as a whole to support the Commission's decision. The Commission's conclusion that the funding agreement standing alone does not come within the provisions of Section 15 is a tenable one and not arbitrary or capricious, especially in view of the paucity of dispositive precedent on the question." (R. 792).

The Commission was not capricious in its analysis of this matter. It is clear from the entire record that considerable study was given to the issue herein involved. In fact not only did the Commission find that this agreement under analysis was not one which

would be required to be filed pursuant to section 15 but it also went on to say what type of agreement would be required to be filed, namely, an agreement to pass on the cost directly to the shippers. The Commission after reviewing the evidence presented, found no agreement to pass the cost on to the shippers by PMA members. In fact some of the members did not pass the automobile assessment cost on. Accordingly, the Commission's findings in this matter should not be disturbed.

The Hearing Examiner in finding that section 15 did not require the filing of cooperative working arrangements that did not burden ocean transportation, not only looked to the legislative history but also applied the rule of *ejusdem generis*. As the Examiner stated, "Under this rule the Commission would be required to construe the language: 'in any manner providing for an exclusive, preferential, or cooperative working arrangement' coming as it does at the end of a list of practices and arrangements as limited to the practices and arrangements of the same general class as those specifically mentioned in the previous six categories."

This court has long and often recognized the role of administrative agencies in interpreting administrative statutes. This court has said,

> "the scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern

> . . . the very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters." *Securities Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 at 207-08 (1947).

Recently in reviewing an interpretation of the Interstate Commerce Act this Court declared "judicial review of this conclusion is limited to consideration of whether it has a rational basis and is supported by substantial evidence.". *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115 (1962). In the instant case there is no departure by the Commission from earlier precedent and it is clear from the record that there was a rational basis and substantial evidence to support the Commission's interpretation.

III. There Was No Showing Of Undue Or Unreasonable Prejudice Or Disadvantage

The findings that there was not a sufficient showing of undue or unreasonable prejudice or disadvantage were well considered, properly sustained by the Court of Appeals and should not be reversed.

A. The petitioners have conceded that section 16 of the Shipping Act, 1916, was not violated.

It is difficult to see how one can argue that the Commission failed to give adequate consideration to the allegation of violation of section 16 when the petitioner in its brief stated as follows:

> "We do not claim that the measurement formula 'regardless of how manifested' subjects Volks-

wagen automobiles to 'prejudice or disadvantage' as compared to other automobiles, and we submit that there is no other cargo classification in competition with automobiles.

Under decisions of predecessor agencies of the Federal Maritime Commission in such cases, section 16 of the Shipping Act (46 U.S.C. 815), has been held inapplicable. *Huber Mfg. Co.* v. *N. V. Stoomvart Maatschappij 'Nederland,'* 4 F.M.B. 343 (1953); *The Paraffine Companies, Inc.* v. *American-Hawaiian S.S. Co.*, 1 U.S.M.C. 628 (1936); *Johnson Pickett Rope Co.* v. *Dollar S.S. Lines, Inc., Ltd.*, 1 U.S.S.B. 585 (1936). The Hearing Examiner may consider himself bound by these precedents.

Our only reason for invoking section 16 at this time, accordingly, is to preserve the issue so as to be able to ask for a reconsideration of the above rulings if this case should reach the Commission itself and also to have it available for possible judicial review." (R. 652).

As stated in the Solicitor General's brief, there was no discrimination between competitors here. The mechanization fund assessment fees did not distinguish between different makes of automobiles. The Solicitor General's brief went on to point out that the Commission's view has been supported by interpretation that has been placed on section 3(1) of the Interstate Commerce Act, 49 U.S.C. § 3(1). Brief for the U.S., p. 35. The petitioner, however, seeks to rely on the decision in the case of *New York Foreign Freight Forwarders and Brokers Association* v. *FMC*, 337 F.2d 289 (2d Cir. 1964), *cert. denied*, 380 U.S.

914 (1965). There, the court reviewed six rules promulgated by the Commission affecting the ocean freight forwarding industry. One rule required a licensed freight forwarder to itemize in his billing the actual expenditures made on the shipper's behalf as well as the fees assessed for his own services. The court agreed that there was no discrimination in the sense that some shippers are billed differently from other shippers. Nevertheless, the court held that "we do not believe competitive relationships must be shown to justify the prophylactic disclosure technique" of the rule. 337 F.2d at 300. It was the prophylactic purpose which the court felt justified the rule, not the competitive relationships which might be affected.

The petitioner also relies on *Investigation of Free Time Practices, Port of San Diego*, 9 F.M.C. 525 (1966). The Commission examined the free time and free storage practices for cargo on the piers and found the practices bear no relationship to the character of the cargo service, saying "it is extended to cargo on equal terms without regard to size, shape or any other characteristic inherent in the particular cargo involved. The equality required in situations *of this kind* is absent and is not conditioned on such things as competition, proximate cause and the like." *Id.* at 547. (Emphasis supplied). It is clear that the Commission views the situation in the instant case and the situation in the San Diego case as different on their facts. The Commission was careful in the San Diego case to restrict its discussion of a possible violation of section 16 to the facts of that case only.

The Commission stated "to the extent that the other cases may read as requiring the establishment of a competitive relationship *in the situation here involved* they are overruled." (Emphasis supplied). Accordingly, the diminution, if any, of the competitive relationship principle as a result of the above two cases is limited only to those situations in which there are services that are not dependent upon the nature of the cargo and varying charges therefor. It is clear that in the instant case there are different charges depending upon the nature of the cargo involved. The above cited cases relied upon by petitioner are not applicable. Storage space was the commodity involved in the San Diego case and space is space. However, unloading of potatoes, lumber and automobiles is not the same. The Commission's finding that the practices herein involved were neither unjust nor unreasonable was arrived upon after full consideration of the case.

B. The Commission in examining the evidence submitted to it did not find a basis for holding that the practice here involved was unjust or unreasonable in violation of section 17.

It is not the role of the Commission to establish that a practice was just and reasonable in order to determine that it was not unjust and unreasonable. Nevertheless, the Commission did examine every facet of the argument presented to it and arrived at a finding which is sustainable as being reasonable. The Commission recognized that there was a variance in assessment for automobiles and other cargo items.

The Commission pointed out in its opinion that there is, however, no statutory requirements that all users of a facility be assessed equally. It cannot be argued that different charges for carriage or handling of different commodities is illegal *per se*. In fact the Commission has recognized that different commodities may well be charged different rates. *Aleutian Marine Transport Co., Inc.—Rates From, To and Between Seattle, Washington and Ports in Alaska*, 7 F.M.C. 592 (1963). *Pacific Coast Hawaiian and Atlantic Gulf Hawaiian General Increases in Rates*, 7 F.M.C. 260 (1962). The Commission will not normally declare a charge unlawful as long as substantial benefits are provided for one against whom a charge is levied. *Evans Cooperage Co., Inc.* v. *Board of Commissioners*, 6 F.M.C. 415 (1961). It should be pointed out here the fact is that there is no levy against the shipper but only against the terminal operator who clearly received substantial benefits. The shipper, in turn, has, of course, received substantial benefits. The Commission went on, however, to point out that there would be an exception to the foregoing principle if "the leviers of a charge imposed it in an unequal fashion because of a design deliberately to burden one of the users of its service more than any other." (R. 677). The Commission found no deliberate design after reviewing the evidence presented to it. Rather, it found that there was a sound business basis for the assessment as derived by PMA. The basis of the assessment was derived through the business judgment of PMA. The Association had collected dues

for many years, without objection, on the same basis as the mech fund assessment was determined. The Commission did not determine availability of sufficient evidence to establish to its satisfaction that the practice herein involved was unreasonable. In fact, nowhere in the record has petitioner shown what the cost is for unloading a vehicle. Thus, it cannot be argued that the Commission did not fully examine this issue or the evidence presented to it. Accordingly, the Federal Maritime Commission arrived at a conclusion, based on the facts presented to it, that there was no unjust or unreasonable practice.

C. The Commission's findings concerning alleged violations of sections 16 and 17 were based upon the Commission's expertise.

These findings must be accorded finality. This was recognized by the court below. The court of appeals, in upholding the Commission's finding concerning alleged violations of sections 16 and 17, relied upon a recent decision of this court in *Consolo* v. *FMC*, 383 U.S. 607 (1966) wherein this court stated:

> "Section 10(e) of the Administrative Procedure Act . . . gives a reviewing court authority to 'set aside agency action, findings, and conclusions found to be (1) arbitary, capricious, [or] an abuse of discretion . . . [or] (5) unsupported by substantial evidence. . . .' *Cf. United States* v. *Interstate Commerce Commission*, 91 U.S. App. D.C. 178, 183-184, 198 F.2d 958, 963-964, cert. denied, 344 U.S. 893. We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to

support a conclusion.' *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 229. '[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300. This is something less than the weight of evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106; *Keele Hair & Scalp Specialists, Inc.* v. *FTC*, 275 F.2d 18, 21.

Congress was very deliberative in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence; it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of a statute." 383 U.S. at 619-20 (footnote omitted).

Such a position is particularly relevant in this case because of the technical and specialized nature of the subject involved.

CONCLUSION

The judgment of the court below giving proper deference to the role of an agency in interpreting statutes administered by it and evaluating evidence submitted to it should be affirmed.

Respectfully submitted,

JAMES L. PIMPER,
General Counsel,

ROBERT N. KATZ,
Solicitor,

JOSEPH F. KELLY, JR.,
Attorney,
Federal Maritime Commission

November 1967.

APPENDIX

The pertinent provisions of the Shipping Act 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, are as follows:

Section 15:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commistsion a true copy, or if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understanding, conferences, and other arrangements.
>
> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from

the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modification, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry

out in whole or in part, directly or indirectly, any such agreement, modifications, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of section 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however*, That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were enter into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after

the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

Section 16:

* * * *

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *.

* * * *

Section 17:

* * * *

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 280582 349